

International Law Studies – Volume 37

International Law Situations with Solutions and Notes

U.S. Naval War College (Editor)

The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. government, the U.S. Department of the Navy or the Naval War College.

SITUATION II

NAVAL PROTECTION DURING STRAINED RELATIONS

The relations of states X and Y, non-American states, are strained. Neither state has declared war though the military and naval forces have within a month exchanged shots. A law identical with the Joint Resolution of the United States approved May 1, 1937, providing for restrictions on export of arms, etc., is similarly operative in American states C, D, E, and F. Only states C and D under their laws proclaim a state of war to exist between X and Y.

(a) State X seizes articles on board a merchant vessel of state D which were placed under an embargo by state C but not in the embargo list of any other state.

(b) A vessel of war of state Y is just off, but more than three miles, from state D and inspects the cargo of a merchant vessel flying the flag of D and finds articles embargoed by state D.

(c) State E has a defensive alliance with states X and F. State E maintains that the embargo law does not apply until proclaimed by E and F.

(d) A merchant vessel of state M is passing through the territorial waters of state C having on board articles enumerated under the prohibited list of C. A vessel of war of C brings the vessel to port, and the owners demand immediate release

on the ground of illegal seizure while on innocent passage in the time of peace with goods not liable to seizure.

How far are the acts of the several states and their contentions lawful?

SOLUTION

(a) As there is no war and as the law mentioned relating to the export of arms, etc., is national in its effect, the action of state X has no validity under that law even though states C and D have proclaimed that a state of war exists.

(b) A vessel of war of state Y has the right to approach a merchant vessel suspected of piracy or other offense against the law of nations for purpose of identification, but the vessel of war of state X has no right to inspect or to take any action in regard to the articles in the cargo of a merchant vessel of state D and embargoed under domestic law.

(c) The alliance between states E, F, and X would bind state E for defense and not before state X or F is at war with a third state.

(d) The embargo legislation is purely domestic and a vessel of war of state C may not lawfully interfere with a merchant vessel of state M when on innocent passage through the territorial waters of state C.

NOTES

Strained relations.—Strained relations between tribes in early days and between groups of less developed peoples in some parts of the world have led to contests of different types. Some of these show parallels to contests between states in later

days. Sometimes the differences were settled by a competition in the exchange of epithets or vituperation. Wars of words or of notes have been known in modern times.

Efforts to bring about perpetual peace among states have been made from time to time for many years. Some of the plans devised for that purpose have received wide nominal support, but when brought to a crucial test have thus far been ineffective. Even the World War, 1914–18, having as one of its objectives, “war to end war,” has not put an end to conflicts between states even though these may not reach the proportions of or may not be declared to be war. If a stage in international development should be reached when wars would be no more it can scarcely be hoped that there will be no friction between states when there are so many racial, economic, political, and other differences.

In considering the very existence of states, there is an implication of differences which have led to their formation. Referring to these matters at the Naval War College in 1933 it was said:

“Strained relations is a term which has been used to indicate an attitude of opposition of states to one another in any degree short of war. Such relations often lead to war but are not war and the existence of these relations does not bring into operation the law of war.” (1933 Naval War College, International Law Situations, p. 75.)

Use of force.—Even though the custom of formal declaration of war declined during the seventeenth, eighteenth, and nineteenth centuries, the use of force by one state against another was common. With the further development of professional armies and navies, the need of clearer rules in regard to war became evident. Such rules for the

conduct of war were gradually elaborated for war on land as in the Lieber Code during the Civil War in the United States which became the basis of other codes.

The conduct of war on the sea as affecting states not parties to the war was the subject of attention by the British courts in the days of Lord Stowell and from the beginning of the nineteenth century.

War had been defined as "that state in which a nation prosecutes its right by force." There had been no adequate definition of the degree of force essential to constitute war and there was, as there still is, a wide difference of opinion as to what is a nation's "right," or what is a "just war."

Battles had been fought against Mexican troops before the Congress of the United States passed the Act of May 13, 1846, which recognized a state of war as existing with Mexico.

Courts might have to decide in the nineteenth century whether war existed on a given day and a state might by a proclamation announce that war commenced on some date prior to the declaration. This is evident in such cases as that of the *United States of America v. Pelly and another* in 1899. In this case, Mr. Justice Bingham said:

"I will state why it is a fact that a state of war then existed. An act of hostility had been committed on April 22 by American men-of-war against Spanish traders, or, at all events, against one Spanish trader, which act, in my opinion, was only consistent with the existence of a state of war. Further, on April 22 the American President issued a proclamation in which he declared a general blockade of Cuba. A few days later the Congress passed a resolution authorizing a formal state of war, but, in so doing, recorded, what was undoubtedly the fact, that a state of war had existed from some days previously." (4 Commercial Cases [1899] 100.)

There was also much uncertainty as to when the Russo-Japanese war began in 1904. It was decided that when the Japanese fleet sailed from Sasebo, February 6, 1904, at 7 A. M., "with the object of opening hostilities," there was a state of war and captures were legal. From the late nineteenth century when fleets sailed under sealed orders for maneuvers or practice, there might be serious misunderstandings since foreign powers were free to determine the "object" of the movement of the fleet.

When states were not under obligation to declare war, there was frequent resort to the use of force which was announced to be reprisals, pacific blockade, or some other measure short of war. Either state might regard such an act as the commencement of war. Such a condition left third states uncertain as to whether war really existed or as to when it actually began. This introduced many complications though some states maintained that the advantage of a possible surprise attack should not be renounced. Others argued that under modern conditions there was little possibility of surprise in the commencement of war.

Distinction between belligerent and protective action.—The situation arising in Russia in 1919 became the subject of correspondence between the Commission to Negotiate Peace and the American Secretary of State. In replying to certain proposals, the acting Secretary of State said, on July 18, 1919, "A blockade before a state of war exists is out of the question" (Foreign Relations, U. S., 1919, "Russia," p. 153), and at this time it was generally accepted that war without a declaration would be contrary to the law. The distinction be-

tween belligerency and military operations was also discussed in the Commission, and a communication was, at the request of M. Clemenceau, transmitted to the President of the United States on July 27, 1919:

"British, French, Italian, Japanese members of the Council of Five, respectfully offer the following on the President's message relating to neutral trade in the Gulf of Finland. They do not desire to express any opinion upon the statement of international law laid down in the telegram. It may well be true that where there is no state of belligerency there can be no legal blockade; but they would point out that the situation in Russia and in the Gulf of Finland is at the present moment such as hardly to permit rigid application of rules which in ordinary cases are quite uncontested. Language in which international law is expressed is fitted to describe the relations between the organized states on the one hand and unorganized chaos on the other hand. Russia during this period of transition is not a state but a collection of 'de facto' governments at war with each other and though it is quite true to say that the Allied and Associated Powers are not in a state of belligerency with Russia it is also true they are involved in military operations with one of these 'de facto' governments and that they are supplying arms and ammunition to the others." (*Ibid.*, p. 154.)

To this the President replied on August 2, 1919:

"The President is not unmindful of the serious situation which exists in relation to neutral trade in the Baltic with the Russian ports controlled by the Bolsheviks. He has given careful consideration to the arguments advanced in the message transmitted at the request of M. Clemenceau and is not unmindful of their force in support of the proposed interruption of commerce with the ports mentioned. However, while he fully understands the reasons for employing war measures to prevent the importation of munitions and food supplies into the portion of Russia now in the hands of the Bolsheviks, he labors under the difficulty of being without constitutional right to prosecute an act of war such as a blockade affecting neutrals unless there has been a

declaration of war by the Congress of the United States against the nation so blockaded.

“The landing of troops at Archangel and Murmansk was done to protect the property and supplies of the American and Allied Governments until they could be removed. The sending of troops to Siberia was to keep open the railway for the protection of Americans engaged in its operation and to make safe from possible German and Austrian attack the retiring Czechoslovaks. The furnishing of supplies to the Russians in Siberia, while indicating a sympathy with the efforts to restore order and safety of life and property, cannot be construed as a belligerent act.” (*Ibid.*, p. 155.)

Purpose of Act of May 1, 1937.—In reply to a question of November 25, 1937, as to the use of the Act of May 1, 1937,¹ as an instrument of policy, the Secretary of State said:

“With regard to the eighth question, the entering into force of the restrictive provisions of the Neutrality Act of May 1, 1937, is left to and is dependent upon decision of the President by a finding that ‘there exists a state of war.’ The policy of the Department of State in reference to this Act is dependent upon that decision. The Department of State keeps constantly in mind the fact that the principal purpose of the Act is to keep the United States out of war.” (International Conciliation, No. 336, p. 36; Department of State, Press Releases, XVII, No. 428, p. 416.)

National and international neutrality laws.—It is desirable to point out again that “Domestic neutrality laws do not necessarily have any effect upon the international law of neutrality either in limiting or extending its scope.” (1936 Naval War College, International Law Situations, p. 98.) A domestic law prohibiting exportation of arms to a foreign state or states when these states have not declared war is wholly national and may be repealed or declared inoperative in whole or in part

¹ *Post*, p. 171.

at any time by the state which enacted the law. Such a law does not confer upon any foreign state a right to treat the articles named in the prohibition as contraband of war, or to treat the vessels transporting the articles as guilty of the carriage of contraband. Indeed as a domestic measure a state in the time of peace or even when relations are strained between foreign states may, in absence of treaty agreement, prohibit under penalty of domestic law the exportation of certain articles, extend the list, or abolish the restrictions altogether from time to time as it may see fit. In time of lawful war the list of articles liable to penalty may be determined by the belligerent and the belligerent may under international law capture the goods and apply the penalty. The government of the United States has often in time of unsettled conditions changed its policy in regard to the export of certain articles. Domestic laws which may have an effect even upon international agreements relating to shipment of arms may be enacted or repealed. This was evident in a communication of the Secretary of State Hughes to the Chargé in Japan, March 19, 1921:

“A joint resolution of Congress approved March 3, 1921, repealing certain sections of the Espionage Act of June 15, 1917, has deprived this Government of any legal basis under which it can control shipments of arms and munitions to China as provided for in the joint declaration made on May 5, 1919 by the diplomatic representatives of Great Britain, France, Italy, Spain, The Netherlands, Denmark, Belgium, Portugal, Brazil and Japan. This Government has not changed its policy in this regard however and is seeking from Congress legislation necessary to enable it to continue control over shipments of arms to China and in the meantime will refuse to support any efforts on the part of Ameri-

can citizens to ship or sell arms to China. You will bring the above to the attention of the Japanese Foreign Office for its confidential information and express this Government's hope that nothing will be done to change the present policy of the Powers in this matter." (Foreign Relations, U. S., 1921, I, 552.)

Further correspondence shows that so far as the United States was concerned, the whole matter of prohibition of shipment of arms was regarded as subject to domestic legislation and that international agreements in regard thereto would be correspondingly limited by domestic regulations.

The Government of the United States in 1920 without ratifying the Arms Traffic Convention and Protocol, September 10, 1919, announced that it adopted the spirit of this Convention "as a matter of policy, insofar as concerns government owned or controlled arms." (Foreign Relations, U. S., 1920, I, 207.)

Hostilities without declaration.—An act of hostility by an armed force of a state without some form of previous public notification was in early times regarded as an act of perfidy and previous notification in the days of Rome was usually a formal ceremony. Without such ceremony the war might not be considered a just war. It was argued that if the object of the war might be obtained without the use of force, it was honorable that the state against which hostilities were to be aimed should have opportunity to afford satisfaction before force was used. The mediaeval conception of chivalry demanded this degree of fair dealing in a just war. Grotius in the early seventeenth century regarded formal declaration as the rule if war was to be recognized internationally, though there might be

a demand for satisfaction with conditional declaration.

Prior declaration was less general from the late seventeenth century. Of about 150 wars during the two centuries from 1700 to 1900 few, not more than one in ten, seem to have been formally declared at all and some like the Spanish-American war of 1898 were declared after hostilities had begun.

As the relations of state to state and of individual to individual change when war begins, it is of great importance to fix the time of the commencement of war. In the early days this was not difficult but during the eighteenth and nineteenth century this became uncertain or impossible.

The formula which at first seemed simple was set up to the effect that "war begins with the first act of hostilities." This phrase was, however, not easy to interpret and sometimes was differently interpreted by courts of the same country at different periods; consequently controversies arose upon the issue of the date of the beginning of the war.

Prior declaration.—In the late nineteenth and early twentieth centuries, a sentiment had been growing in favor of requiring a declaration prior to the opening of war. The Institute of International Law at the session at Ghent in 1906 favored such a regulation.

It was pointed out that diplomatic negotiations settled most differences between states and that a requirement of a declaration before resorting to hostilities would often prevent hostilities, and if a reasoned declaration was required this would be a further deterrent, for states might be reluctant to

make public their motives for going to war. It was argued that a state should not go to war without an ample motive as war disturbed many established relations in the world. Third states should be notified as these states were put under new obligations and these should not be imposed without due notice and good reason. Of course, it was fully understood that the published reason might not always be the true reason, but the honor of the state was involved or, as the French delegate at the Second Hague Conference, 1907, said, "the spirit of loyalty which nations owe to each other in their mutual relations, as well as the common interests of all states," should require previous and unequivocal notice. Any delay would afford more time for pacific settlement.

Declaration of war.—As was shown at the Hague Peace Conference in 1907, there were many reasons for a declaration of war before commencement of hostilities. Many conventions and treaties since 1907 have rested on the presumption that declaration prior to hostilities will be made. For neutral states this is essential in order that they may by proclamation regulate the conduct of their nationals and determine the rights and obligations governing the state under the changed conditions. The use of the neutral ports as places of sojourn of vessels of war of the belligerents and in other respects must be regulated, the amount and character of supplies or of repairs is to be determined and an entirely new legal status is in existence from the commencement of the war. Merchant vessels of neutrals outside of neutral jurisdiction are under obligation to submit to visit and search,

may be taken to a prize court and their cargo may be condemned in whole or in part or the vessel itself may be condemned. The movement of neutral vessels or persons may be restricted or forbidden in certain areas. Even between the belligerents the rights of persons and property assume new aspects. It is conceivable that these facts, together with a required prior declaration, may be a deterrent at times sufficient to prevent hostilities or reckless warlike undertakings.

Hague Convention on declaration of war.—The discussion in 1907 upon the need for declaration prior to hostilities between states showed that it was realized that in cases of civil war such a declaration would not always be expected though it might in some conditions clarify relations.

Hague Convention III relative to the Opening of Hostilities states:

“The Contracting Powers considering that it is important, in order to ensure the maintenance of pacific relations, that hostilities should not commence without previous warning;

“That it is equally important that the existence of a state of war should be notified without delay to neutral Powers; * * *

“ARTICLE 1. The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

“ARTICLE 2. The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph. Neutral Powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war.” (36 Stat. 2259.)

In explaining Article 1, the report of the Commission entrusted with the topic said:

“Two distinct cases are provided for. When a dispute occurs between two States, it will ordinarily lead to diplomatic negotiations more or less lengthy, in which each party attempts to have its pretensions recognized, or at least to secure partial satisfaction. If an agreement is not reached, one of the Powers may set forth in an ultimatum the conditions which it requires and from which it declares it will not recede. At the same time it fixes an interval within which a reply may be made and declares that, in the absence of satisfactory answer, it will have recourse to armed force. In this case there is no surprise and no equivocation. The Power to which such an ultimatum is addressed can come to a decision with a full knowledge of the circumstances; it may give satisfaction to its adversary or it may fight.

“Again, a dispute may arise suddenly, and a Power may desire to have recourse to arms without entering upon or prolonging diplomatic negotiations that it considers useless. It ought in that case to give a direct warning of its intention to its adversary, and this warning ought to be explicit.

“When an intention to have recourse to armed force is stated conditionally in an ultimatum, a reason is expressed, since war is to be the consequence of a refusal to give the satisfaction demanded. This is, however, not necessarily the case when the intention to make war is made manifest directly and without a previous ultimatum. The proposal set out above requires that reasons be assigned in this case also. A Government ought not to employ so extreme a measure as a resort to arms without giving reasons. Every one, both in the countries about to become belligerents, and also in neutral countries, should know what the war is about in order to form a judgment on the conduct of the two adversaries. Of course this does not mean that we are to cherish the illusion that the real reasons for a war will always be given; but the difficulty of definitely stating reasons, and the necessity of advancing reasons not well substantiated or out of proportion to the gravity of war itself, will naturally arrest the attention of neutral Powers and

enlighten public opinion." (Proceedings of the Hague Peace Conferences, Translation, Carnegie Endowment of International Peace, I, 132.)

This report of the Commission shows that the Conference was not so naive as to think that the reasons stated for declaring war would always cover all the reasons but that the obligation to give a reason might be to some degree a deterrent.

Further, it may be said that a very effective and automatic sanction making declaration essential was the requirement that declaration be published to third states before these states were under the obligation of neutrals. There could be no contraband, blockade, unneutral service, etc., till the declaration was made known. Third states would be under no obligation to limit the use of their ports for sojourn, the taking on of supplies, repairs, etc., or even the sale of vessels of war might lawfully be made prior to declaration of war.

Embargo Act, 1807.—The conditions which led to the Embargo Act of December 21, 1807, may not recur even though Jefferson hoped it might furnish a valuable lesson for the future. This would be upon the presumption that conditions at the time of a subsequent struggle might closely resemble those at the beginning of the nineteenth century. Almost immediately the exports from the United States fell to a point where that trade was only about one-fifth that of the previous year and conditions in regard to illicit trade in many articles resembled those of the recent prohibition era in the United States. National politics were embittered, leaders previously popular were repudiated, and sectional differences were aggravated. The attitude of citizens of the United States toward the

belligerents became hostile and demands for protection of American rights were frequently made. The embargo was repealed in May 20, 1809, leaving a spirit easily fanned into belligerency a few years later. Since this period of the early nineteenth century, there has been much difference of opinion upon the question as to whether relinquishing or defending neutral rights may be the course more likely to lead a powerful state into a war.

British hovering, 1916.—Even in time of war the authorities of the United States have regarded the sojourn of belligerent vessels of war just outside territorial waters as inconsistent with conduct of a friendly power and as causing unnecessary interference with American commerce.

During the World War, early in October 1914, the Department of State called the attention of the British Ambassador to the fact that the nearness of British vessels of war to the entrance to the port of New York was causing “a very bad impression”:

“While, of course, the presence of these vessels does not constitute anything in the nature of a blockade by Great Britain, the effect is to interfere so with our commerce with her enemies as to infringe upon our commercial rights in appearance if not in fact.

“I am writing you personally in regard to this matter, as I have already told you informally that the presence of the *Suffolk* had caused considerable concern and that its continuance might be construed into an unfriendly act, requiring official action. This latter possibility I hope can be avoided.” (Foreign Relations, U. S., 1914, Supp., p. 657.)

Other incidents followed and further protests were made by the United States, and a letter of

March 20, 1916, from the British Ambassador to the Secretary of State said:

"My Government has carefully studied the contents of your notes. They are impressed by the fact that no suggestion seems to be made in either of them that British cruisers enter at all within the territorial waters of the United States, and they note that, on the contrary, the effect of the notes is to take exception to proceedings of these vessels when navigating admittedly on the high seas. The objection appears, indeed, to rest upon a claim to distinguish between different parts of the high seas, a claim which causes surprise to His Majesty's Government, who are unaware of the existence of any rules or principles of international law which render belligerent operations which are legitimate in one part of the high seas, illegitimate in another. Under these circumstances it appears desirable that the position taken up by the United States Government should be more clearly defined. I am therefore instructed to have recourse to your courtesy in order to obtain fuller information as to the precise nature and grounds of the claims which are made by your Government, as well as their extent, since my Government are most anxious to recognise in the full any claims of this nature which are well founded in law, but are naturally unable to make a concession of what they regard as their belligerent rights.

"The rights asserted in this respect by the United States Government in previous wars will no doubt be conceded by the United States Government as well founded when exercised by others. It will be in your recollection that my predecessor, Lord Lyons, complained that Rear Admiral Wilkes had ordered the vessels under his command to anchor in such a position as to control the movements of ships desiring to enter or to depart from the port of Bermuda, and that he maintained a system of cruising in the neutral waters of Bermuda in excess of his rights as a belligerent. The charge was thus of a far more serious nature than that which the United States Government now make against His Majesty's ships. Admiral Wilkes in his reply, which was communicated officially by Mr. Secretary of State Seward to His Majesty's Legation on January 15, 1863, asserted that

his vessels 'but maintained a system of cruising outside of the neutral waters of Bermuda in and under our rights as a belligerent.' It is clear, therefore, that this officer of the United States Navy, whose view was evidently endorsed by the United States Government, considered that his proceedings were fully justified so long as he could maintain that they had been restricted to the very practice of which the United States Government now complain, though resorted to in a far less aggravated form by His Majesty's ships, and of which they appear actually to desire to impung the legality." (*Ibid.*, 1916, Supp., p. 759.)

On April 26, 1916, the Secretary of State in a long note stated:

"In reply it may be stated that the Government of the United States advances no claim that British vessels which have been and are cruising off American ports beyond the three-mile limit have not in so doing been within their strict legal rights under international law. The grounds for the objection of the Government of the United States to the continued presence of belligerent vessels of war cruising in close proximity to American ports are based, not upon the illegality of such action, but upon the irritation which it naturally causes to a neutral country." * * *

"In time of peace the mobilization of an army, particularly if near the frontier, has often been regarded as a ground for serious offense and been made the subject of protest by the Government of a neighboring country. In the present war it has even been the ground for a declaration of war and the beginning of hostilities. Upon the same principle the constant and menacing presence of cruisers on the high seas near the ports of a neutral country may be regarded according to the canons of international courtesy as a just ground for offense, although it may be strictly legal." (*Ibid.*, p. 763.)

The British authorities took the position that they could not abandon any of their belligerent rights, but instructions had been given "not to approach Ambrose Light nearer than six miles."

Protests were also made to Germany, France, and Japan in regard to the conduct of vessels of war of these states just off or within territorial waters.

Restriction on exports.—Restriction on exports from one state to another has often been resorted to in order to bring pressure upon the importing state. The reason for the pressure may vary and being most often domestic in character are usually political.

A Joint Resolution of Congress of the United States, approved March 14, 1912, provided:

“That the joint resolution to prohibit the export of coal or other material used in war from any seaport of the United States, approved April twenty-second, eighteen hundred and ninety-eight, be, and hereby is, amended to read as follows:

“‘That whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or Congress.

“‘SEC. 2. That any shipment of material hereby declared unlawful after such a proclamation shall be punishable by fine not exceeding ten thousand dollars, or imprisonment not exceeding two years, or both.’” (37 Stat. 630.)

By presidential proclamation this resolution was made immediately applicable to Mexico when a condition of “domestic violence” prevailed.

In 1914 after the outbreak of the World War and while the United States was neutral, a Circular of the Department of State, October 15, 1914,

referring to trade in contraband and sales to belligerents, said:

“Furthermore, a neutral government is not compelled by international law, by treaty, or by statute to prevent these sales to a belligerent. Such sales, therefore, by American citizens do not in the least affect the neutrality of the United States.

“It is true that such articles as those mentioned are considered contraband and are, outside the territorial jurisdiction of a neutral nation, subject to seizure by an enemy of the purchasing government, but it is the enemy’s duty to prevent the articles reaching their destination, not the duty of the nation whose citizens have sold them. If the enemy of the purchasing nation happens for the time to be unable to do this that is for him one of the misfortunes of war; the inability, however, imposes on the neutral government no obligation to prevent the sale.

“Neither the President nor any executive department of the Government possesses the legal authority to interfere in any way with trade between the people of this country and the territory of the belligerent. There is no act of Congress conferring such authority or prohibiting traffic of this sort with European nations, although in the case of neighboring American Republics Congress has given the President power to proclaim an embargo on arms and ammunition when in his judgment it would tend to prevent civil strife.” (Foreign Relations, U. S. 1914, Sup., p. 574.)

Many restrictions were from time to time imposed upon exportation from the United States of munitions and the like under the act of June 15, 1911, which had entrusted to the President this power.

The restrictions placed on exportation and importation during the World War were not always for military reasons or on the ground of neutral obligations, but the disturbance of economic rela-

tions sometimes made necessary the conservation of national resources by special regulations.

Attitude of the United States in 1921.—In reply to a request from the Oriental Trading Company desiring to ship rifles and ammunition to China, transmitted through the Governor General of the Philippine Islands, the Department of State informed the Secretary of War of its attitude on September 12, 1921, as follows:

“There has been an understanding since May, 1919, among the powers who were allied and associated in the war, whereby they undertook to restrict shipments by their nationals to China of arms and munitions of war as long as it was obvious that the importation of such military equipment into China tended only to prolong the present unfortunate state of civil strife in that country. This Government was enabled to fulfill its part of that obligation by reason of those provisions of the Espionage Act which gave the Executive control over exports, through the intermediary of the War Trade Board.

“Certain provisions of the Espionage Act of June 15, 1917, were repealed by a Joint Resolution of Congress, which was approved March 3, 1921. Among those provisions thus repealed were those which provided for control over exports, and the Executive has therefore been deprived of any legal basis upon which to exercise further control over shipments of arms to China. There would appear to be no reason for believing that conditions in China at the present time warrant any change in the policy of this Government in this matter, and the Department of State is therefore seeking to obtain legislation to enable it to continue to cooperate with the powers who are parties to the joint declaration of May 5, 1919. It is expected that the matter will be brought up when Congress convenes the latter part of the present month. In the meantime, the Department of State, as a matter of policy, is refusing to lend any encouragement or support to American manufacturers of munitions who desire to sell or ship arms and munitions of war to China.” (Foreign Relations, U. S., 1921, I, 560.)

Restrictions on carriage of munitions to Spain.—During the “civil strife” in Spain there were numerous attempts to restrict commerce both by national legislation and international agreement.

The British Merchant Shipping Act (Carriage of Munitions to Spain), 1936 (1 Edw. 8, c. 1), applying in general to all ships under British registry (except from dominions and dependencies) carrying munitions etc., provided:

“I. 1. No article to which this Act applies shall be discharged at any port or place in Spanish territory or within the territorial waters adjacent thereto from a ship to which this Act applies, and no such article shall be transhipped on the high seas from any such ship into any vessel bound for any such port or place, and no such article consigned to or destined for any such port or place shall be taken on board or carried in any such ship.” (31 A. J. I. L. [1937], Doc. Supp., p. 100.)

It was also provided as to an officer empowered to enforce this Act, that—

“(a) he may go on board the ship and for that purpose may detain the ship or require it to stop or to proceed to some convenient place;

(b) he may require the master to produce any documents relating to any cargo which is being carried or has been carried on the ship;

(c) he may search the ship and examine the cargo and require the master or any member of the crew to open any package or parcel which he suspects to contain any articles to which this Act applies;

“(d) he may make any other examination or inquiry which he deems necessary to ascertain whether this Act is being or has been contravened;

“(e) if it appears to him that this Act is being or has been contravened, he may, without summons, warrant, or other process, take the ship and her cargo and her master and crew to the nearest or most convenient port in a country to which this Act extends, in order that the alleged contraven-

tion may be adjudicated upon by a competent court.' (*Ibid.*, p. 101.)

The United States by joint resolution, January 8, 1937, prohibited the export of arms, ammunition, or implements of war to Spain under penalty of fine or imprisonment (50 Stat., pt. I, p. 3). There were many other regulations referring to the Spanish conflict giving a degree of supervision to foreign states in order that the area of the conflict might be limited.

Attitude of United States Navy.—The Navy of the United States through its wide contacts has been confronted with many situations where strained relations prevailed. These strained relations might have been between the United States and a foreign state or between two foreign states in a manner involving the United States. As a guide for officers of the Navy of the United States, the Regulations prescribe:

"722. On occasions where injury to the United States or to citizens thereof is committed or threatened, in violation of the principles of international law or treaty rights, the commander in chief shall consult with the diplomatic representative or consul of the United States, and take such steps as the gravity of the case demands, reporting immediately to the Secretary of the Navy all the facts. The responsibility for any action taken by a naval force, however, rests wholly upon the commanding officer thereof.

"723. The use of force against a foreign and friendly state, or against anyone within the territories thereof, is illegal.

"The right of self-preservation, however, is a right which belongs to States as well as to individuals, and in the case of States it includes the protection of the State, its honor, and its possessions, and the lives and property of its citizens against arbitrary violence, actual or impending, whereby the State or its citizens may suffer irreparable injury. The con-

ditions calling for the application of the right of self-preservation can not be defined beforehand, but must be left to the sound judgment of responsible officers, who are to perform their duties in this respect with all possible care and forbearance. In no case shall force be exercised in time of peace otherwise than as an application of the right of self-preservation as above defined. It must be used only as a last resort, and then only to the extent which is absolutely necessary to accomplish the end required. It can never be exercised with a view to inflicting punishment for acts already committed.

“(1) Whenever, in the application of the above-mentioned principles, it shall become necessary to land an armed force in foreign territory on occasions of political disturbance where the local authorities are unable to give adequate protection to life and property, the assent of such authorities, or of some one of them, shall first be obtained, if it can be done without prejudice to the interests involved.

“(2) Due to the ease with which the Navy Department can be communicated with from all parts of the world, no commander in chief, flag officer, or commanding officer shall issue an ultimatum to the representatives of any foreign Government, or demand the performance of any service from any such representative that must be executed within a limited time, without first communicating with the Navy Department, except in extreme cases where such action is necessary to save life.”

American policy, 1937.—After referring to the disturbed international relations prevailing in 1937 and to the fact that serious hostilities anywhere were a deep concern of the whole world, Secretary of State Hull said on July 6:

“This country constantly and consistently advocates maintenance of peace. We advocate national and international self-restraint. We advocate abstinence by all nations from use of force in pursuit of policy and from interference in the internal affairs of other nations. We advocate adjustment of problems in international relations by processes of peaceful negotiation and agreement. We advocate faithful ob-

servance of international agreements. Upholding the principle of the sanctity of treaties, we believe in modification of provisions of treaties, when need therefor arises, by orderly processes carried out in a spirit of mutual helpfulness and accommodation. We believe in respect by all nations for the rights of others and performance by all nations of established obligations. We stand for revitalizing and strengthening of international law. We advocate steps toward promotion of economic security and stability the world over. We advocate lowering or removing of excessive barriers in international trade. We seek effective equality of commercial opportunity and we urge upon all nations application of the principle of equality of treatment. We believe in limitation and reduction of armament. Realizing the necessity for maintaining armed forces adequate for national security, we are prepared to reduce or to increase our own armed forces in proportion to reductions or increases made by other countries. We avoid entering into alliances or entangling commitments but we believe in cooperative effort by peaceful and practicable means in support of the principles hereinbefore stated." (Department of State, Press Releases, XVII, No. 407, July 17, 1937, p. 41.)

This statement of policy was circulated to other governments in the hope that if they "should approve the principles of the declaration as the underlying bases for international relations, the cumulative effect of their approval would do much to revitalize and to strengthen standards desirable in international conduct." (*Ibid.*, p. 87.)

There was a general approval as shown in replies from states on the different continents.

"Brazilian Minister of Foreign Affairs.

"The Ministry for Foreign Affairs was officially informed concerning the declaration of the principles which orientate the foreign policy of the United States made on the 16th of July by the Secretary of State, Mr. Cordell Hull. The statement of the Secretary of State having been brought to the attention of the President of the Republic by the Minister for

Foreign Affairs, the latter received instructions from the President to make public that the Brazilian Government, entirely sharing the point of view of the Government of the United States concerning the world international political situation, fully agrees with those declarations and gives complete support to the principles formulated therein, which have already been warmly advocated in the inter-American Conference for the maintenance of peace and at other international political assemblies and which it will do everything possible to put into practice by the most convenient methods at every opportunity which arises." (*Ibid.*, p. 89.)

"Note from the French Minister of Foreign Affairs to the American Ambassador to France.

"Today, more than ever before, the need is evident for solidarity between all the nations of the world and vigilant attention to every situation which might lead to a resort to force. In counseling moderation in the realm of international affairs and national affairs; in advising nations not to interfere in the internal affairs of other nations; in recommending the settlement of differences by negotiations and peaceful agreements; in insisting that international obligations should be faithfully observed and carried out in a spirit of justice, mutual helpfulness, and reconciliation, Mr. Cordell Hull has stressed those wholesome methods which should assure the maintenance of peace." (*Ibid.*, p. 94.)

"Message From the British Minister for Foreign Affairs to the American Ambassador to Great Britain.

"I have read with deep interest Mr. Hull's statement on foreign policy of the 16th of July, the text of which was communicated to me by the United States Ambassador. I cordially welcome and am in full agreement with the expression of opinion contained therein on international problems and situations both in the political and economical field. Mr. Hull's views on the ever increasing need for the preservation of peace, the vital importance of international cooperation in every sphere, and the methods which are recommended for obtaining these objectives are shared in common by His Majesty's Government in the United Kingdom." (*Ibid.*, p. 95.)

"Statement by the Japanese Government Handed to the Secretary of State by the Japanese Ambassador.

"The Japanese Government wishes to express its concurrence with the principles contained in the statement made by Secretary of State Hull on the 16th instant concerning the maintenance of world peace. It is the belief of the Japanese Government that the objectives of those principles will only be attained, in their application to the Far Eastern situation, by a full recognition and practical consideration of the actual particular circumstances of that region." (*Ibid.*, p. 130.)

"Statement by the South African Prime Minister and Minister of External Affairs of the American Chargé in the Union of South Africa.

"The statement of foreign policy by Mr. Cordell Hull in every respect conforms with the views held and policy adopted from time to time by the Government of the Union, for the purpose of defining its own attitude towards other states and indicates the principles of conduct which it expects to be observed by them in their dealings with the Union.

"I, therefore, heartily approve the statement of policy by the Secretary of State, so far as the Union is concerned under present circumstances.

"I say: *under present circumstances*, for I cannot help feeling that if the Union had been in the position of a state laboring under wrongs *confirmed* or perpetuated by agreement at the point of the bayonet, such agreement could have little claim to any degree of sanctity; and certainly to none when the agreement had been obtained in a manner violating the established usage of war, or contrary to the dictates of international consciences. Before such an agreement can be accepted as enjoying the *principle of the sanctity of treaties* there should, it seems to me, first be an equitable measure of redress purifying it of the excesses resulting therefrom. In other words, a revision of the provisions of such an agreement could well be insisted upon by the state wronged prior to its approval of the *principle of the sanctity of treaties*.

"If this view is correct, Mr. Hull's advocacy of *faithful observance of international agreements* would not require qualification of a restrictive nature." (*Ibid.*, p. 103.)

The replies from many governments were in the form of somewhat general comments upon the principles underlying the note of Mr. Hull, though occasionally there was an intimation that while the principles were praiseworthy what was particularly needed was the will among states to make the principles practically applicable. A considerable number of states implied that a long step toward the application of the principles might be found in some system of collective security.

Innocent passage.—In the Draft Convention on Territorial Waters, Research in International Law, Harvard Law School, Article 14, the following was proposed:

"A state must permit innocent passage through its marginal seas by the vessels of other states, but it may prescribe reasonable regulations for such passage." (23 A. J. I. L., Spec. Sup., [1929], p. 295.)

In the comment on this article, it was said:

"Even for vessels entitled to exercise the right of innocent passage it is obviously necessary that each state should be permitted to make reasonable regulations governing that passage, subject only to the restriction that these regulations be uniform for all states. Such regulations may, of course, distinguish between different kinds of vessels. For example, a littoral state might require all submarine vessels of other states to navigate upon the surface in order that shipping in the marginal sea may not be subjected to unknown risks." (*Ibid.*)

The question of innocent passage arose in many forms in consequence of attempts of the United States to enforce the liquor prohibition amendment to the Constitution (Article 18), 1919, repealed 1933. In the British Parliament such ques-

tions as the following were raised with the Prime Minister:

"In view of the prohibition laws of the United States and their effect on British shipping and the near approach of 10th June, he can now state what is the policy of His Majesty's Government on this question; and whether they will still adhere to the long accepted international practice under which the laws of its own flag govern and regulate the rights, duties and obligations on board a ship, whether on the high seas or within the jurisdiction of any other nation?" (Parliamentary Debates, Commons, 5th Series, CVXVII (1923), 1972.)

To this question the Prime Minister replied:

"His Majesty's Government do not contend that a ship entering the territorial waters of a country does not subject itself to the jurisdiction of that country, but, as a matter of international comity, such jurisdiction is not generally exercised except to restrain acts likely to disturb public order. No possible disturbance to public order in the United States nor injury to any other United States interest can arise from the existence of liquor under seal on board a ship in United States territorial waters. His Majesty's Government accordingly suggested to the United States Government that the proposed Regulation is one which might properly be discussed with the other maritime Powers before it is enforced, but I understand that the United States Government do not see their way to comply with this request." (*Ibid.*)

After negotiation a treaty with Great Britain containing the following Article was adopted and ratified on May 22, 1924:

"ARTICLE I. The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limits of territorial waters." (43 Stat., Pt. 2, p. 1761.)

Similar treaties were negotiated with other states and the right of innocent passage was generally accepted.

General conclusions.—Neither state X nor state Y has declared war. These states have no right to claim to be acting as belligerents nor to treat other states as neutrals. There would, therefore, be no right to visit and search as a measure of war. No contraband list could be declared, no blockade could be established, nor could there be unneutral service.

A state may at any time establish an embargo and name in the list of embargoed goods such articles as it sees fit. There is always the possibility that some state or states may consider such an embargo as an unfriendly act, whether it restricts the movement of domestic or foreign goods. An embargo is purely domestic and implies no right to exercise authority outside the limits of the jurisdiction of a state. The enforcement of an embargo act is, in absence of specific treaty engagements, a matter for the state establishing the embargo.

Alliances between states are for the objects mentioned and are usually strictly interpreted. A defensive alliance would be effective when one of the states parties to the alliance is attacked. The embargo confers no authority over ships of third states on the high sea. The right to enforce an embargo within the jurisdiction gives no right to deny the right of innocent passage, though, of course, measures may be taken to prevent abuse of the right. This does not confer the right of visit, search, seizure, and condemnation.

A state has a right to go to war. The existence of war changes the relations of all states. Other

states have a right to know when the change takes place, as they must adapt their conduct to the changed relationship. War has always and naturally aimed to obtain all possible advantages, and neutrality has limited belligerent action; hence there has been a conflict of interest between the belligerents and the neutrals.

SOLUTION

(a) As there is no war and as the law mentioned relating to the export of arms, etc., is national in its effect, the action of state X has no validity under that law even though states C and D have proclaimed that a state of war exists.

(b) A vessel of war of state Y has the right to approach a merchant vessel suspected of piracy or other offense against the law of nations for purpose of identification, but the vessel of war of state X has no right to inspect or to take any action in regard to the articles in the cargo of a merchant vessel of state D and embargoed under domestic law.

(c) The alliance between states E, F, and X would bind state E only for defense and not before state X or F is at war with a third state.

(d) The embargo legislation is purely domestic and a vessel of war of state C may not lawfully interfere with a merchant vessel of state M when on innocent passage through the territorial waters of state C.